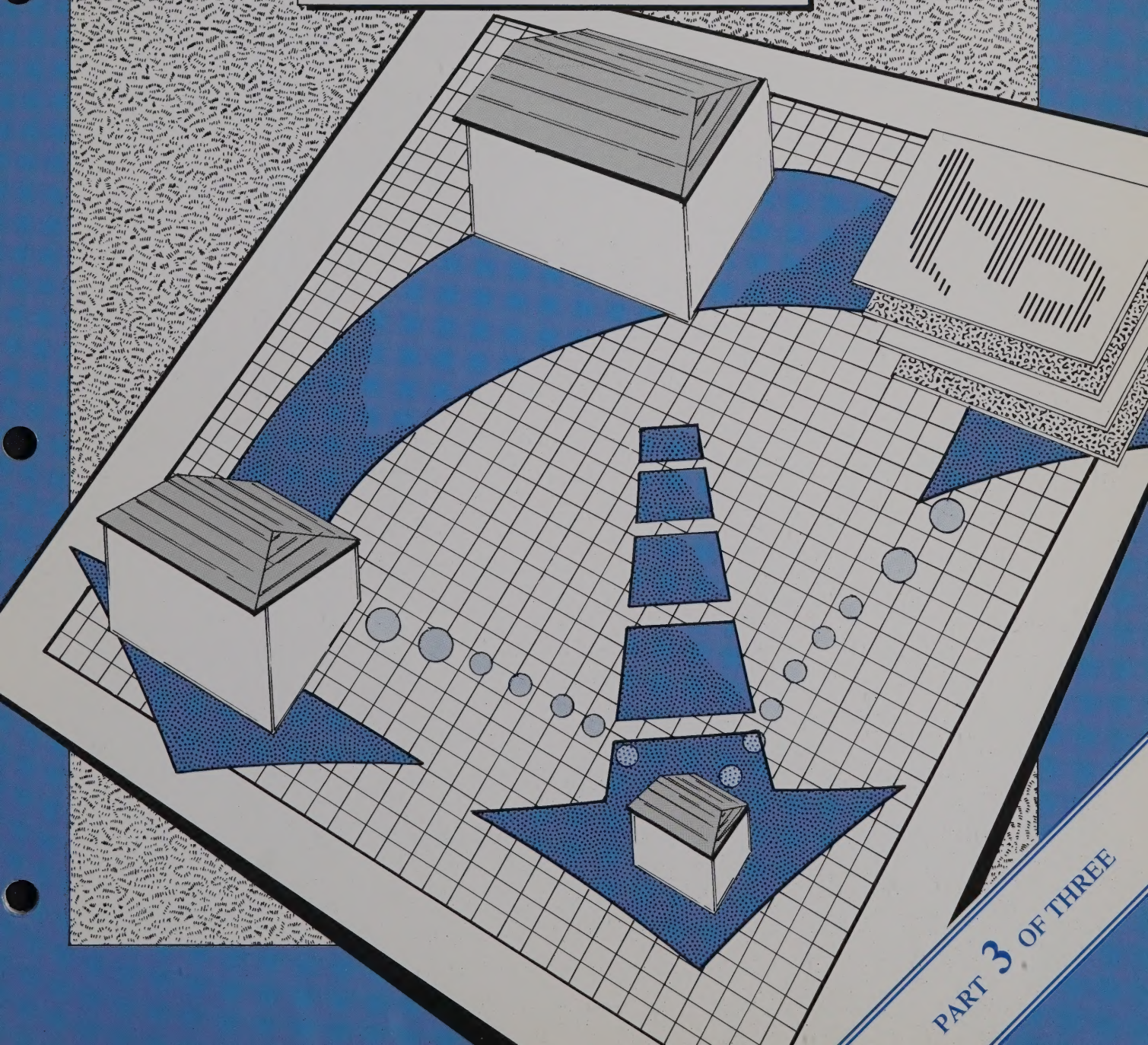
MC0328

DEPARTMENT OF HEALTH

ESTATECODE

PROPERTY TRANSACTIONS IN THE NHS



PART 3 OF THREE

DEPARTMENT OF HEALTH

ESTATECODE

PROPERTY TRANSACTIONS IN THE NHS

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DEPARTMENT OF HEALTH

Part of
ESTATECODE
Level 3

PROPERTY TRANSACTIONS IN THE NHS

Part 3

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These papers comprise matters of general guidance on property transactions which Health Authorities (HAs) may use depending on the specific case and on the views of their professional advisers. Suggestions for additional advice papers and submissions should be sent to:

Department of Health
NHS Estate Directorate
Euston Tower, 286 Euston Road, London NW1 3DN

JULY 1989

Advice Paper 1—Professional Advice

General

1. To ensure the efficient management of the NHS estate, and to meet the obligation to conduct property transactions in a manner which provides adequate safeguards to public funds, HAs should obtain appropriate professional advice and obtain this at the earliest possible opportunity. Discussions with parties outside the NHS should never take place until the appropriate professional advice has first been obtained as this could prejudice subsequent negotiations.

Sources of Advice

2. The professional advice needed will come from a variety of sources depending on the circumstances of the particular case. The main sources of advice are described below.

A. *Regional Estate Surveyor (RES)*

The RES is responsible for providing the "in-house" professional advice on estate and property management to all DHAs within the Region. He must be consulted at the inception of any proposal which affects the estate and, in those RHAs where the Department has authorised the RES to act in place of the District Valuer (DV), he must formally authorise all property transactions. He is also responsible for:

- liaising with DVs
- monitoring the estate activities of DHAs
- contributing to strategic and operational planning (particularly in the tasks of appraisal and rationalisation)
- taking the lead in and managing complex transactions
- briefing and instructing outside consultants.

B. *District Valuer (DV)*

The role of the DV is to provide advice to Government Departments and other public bodies on all property related matters. All NHS property transactions must be formally authorised by the DV unless the Department has authorised other arrangements. The DV makes a charge for his services and all HAs hold details of the scales of charges. The DV can provide advice on:

- valuing property either for acquisition or disposal
- negotiating leases and rents

- conducting transactions
- advising on town and country planning and other related matters
- identifying transactions where advice from private sector consultants should be sought
- advising on the suitability of private sector consultants and agents and assisting with their selection
- providing specialist advice (eg on agricultural land, mineral rights, etc).

C. *Regional Property Panel (RPP)*

RHAs have been asked to set up Regional Property Panels. The composition of RPPs may differ according to the needs of the Region but should always include the RES and other senior estate staff from the Region, together with members of HAs (qualified, or with a special interest, in property matters), representatives of the private sector with property interests (eg Chartered Surveyors, Solicitors, Planners), a representative from the county planning authority, the Liaison Valuer and/or one or more DVs. The aim is to combine their expertise so as to provide advice to HAs on general matters and specific transactions—particularly those involving complex or contentious issues.

D. *Liaison Valuer (LV)*

An LV is appointed for each RHA. His role is to:

- ensure a satisfactory relationship between DVs and HAs
- co-ordinate transactions which involve more than one DV
- liaise between DVs and the Chief Valuer's Office.

E. *Private Sector Consultants*

Private sector consultants may be used to provide specialist advice on property—either because the expertise is not available within HAs or the DV's office, or because they can supply the advice more economically or more quickly. The main areas where the experience of the private sector can help are in:

- strategic planning
- town and country planning matters
- marketing methods
- detailed landlord and tenant casework
- taxation and accounting advice in profit and income sharing arrangements.

In addition, DVs may recommend consultants or agents to deal with individual transactions, valuations, negotiations, etc. Where private sector consultants or agents so act, the responsibility for giving the formal authorisation to the transaction still rests with the DV (or the RES as appropriate). Consultants must only be appointed following competitive tender and there must always be a competitive re-tender exercise at the expiry of a contract.

F. *Commercial Development Advisory Panel (CDAP)*

The White Paper (Working for Patients) suggested that a central group of professionals should be set up to advise on the more complex and specialised property disposals and developments. The CDAP has been set up to meet this suggestion and will become operational from 1 April 1990.

The terms of reference of the Panel are:

> "To advise Health Authorities and Self Governing Hospital Trusts on property development opportunities, including funding arrangements, for developments which are of a complex or specialised nature and in particular where there is an involvement with developers in the commercial sector."

The Panel will be prepared to advise, in respect of individual sites, on:

- the opportunities for site development
- the potential for site exploitation for income generation purposes
- the scope for joint ventures
- funding and legal implications
- sources of professional expertise

Cases for the Panel should be submitted to the Department with full supporting background papers.

Advice Paper 2—Surplus Land and Property: Methods of disposal*

General

1. This paper sets out the various options open to an HA when considering the disposal of surplus land and property. It assumes that decisions to dispose of property are reached following a fully integrated process of service and estate planning. It must be emphasised that the options will vary according to a number of factors (eg the size and location of the property, whether it is likely to be much sought after, what planning permission is likely to be available or has been obtained), and cannot therefore be applied routinely. The HA will need to use its judgement to ensure that the optimum planning and marketing situation is achieved in each individual case. It will need therefore to make full use of the professional expertise available to them, ie the Regional Property Surveyor, the Regional Property Panel and outside consultants. The wide range of disposals undertaken by the NHS will demand that careful regard is taken of the fact that within the overall body of consultants there are individual specialists, and it is most important that advice is taken from the Regional Property Surveyor and/or the Regional Property Panel to ensure that the consultant with the most relevant experience is selected. A critical phase of a disposal is that of obtaining the best planning consent and a full discussion with professional advisers and the DV must take place on the type of consent to be sought and any other material marketing considerations.

The Options

2. The options available are described below, together with their advantages and disadvantages and their suggested use.

A. *Public Tender*

The property will be widely advertised and open to all and the marketing agent, in consultation with the DV, will set a reserve tender price.

Advantages

- The property will be available to a wide market.
- Conditions of public accountability are fully complied with.
- It is possible to obtain a "special purchaser" price (ie one tender considerably greater than any others).

*Based on a paper prepared by the National Property Advisory Group

- A price above the estimated market value may be achieved.
- The HA can be reasonably satisfied that the best possible price has been obtained.
- The sale is "certain" in that a contract is established on the day.

Disadvantages

- The tender procedure involving large numbers of interested parties can be time-consuming and expensive.
- Some potential purchasers do not like tendering "blind" and might therefore be lost.

Suggested Use

This option is likely to be the most widely used in NHS disposals. It is particularly recommended for attractive properties where there is a high development potential.

B. *Private Tender*

The marketing agent, in consultation with the DV, will set a reserve tender price and the property will be widely advertised. Tenders may however be requested from a smaller number of selected potential purchasers.

Advantages

- The cost involved in the tendering action will be reduced.
- "Men of Straw" can be excluded.
- The bids made are more likely to be meaningful because potential purchasers know that they have a reasonable chance of success in relation to the work they will need to do.
- The sale is "certain" in that a contract is established on the day.

Disadvantages

- The limited number of potential purchasers means that the HA cannot be absolutely certain that they have obtained the best possible price.
- Questions of public accountability may arise over the selection of potential tenders.

Suggested Use

This option is seen as being useful where a property or site is large and/or mixed and where it is not appropriate to break it down into smaller lots, or for sites which are of such size that only a few big companies have the necessary resources.

This option could also be used on properties which present marketing difficulties but where resolution of the difficulties is not possible.

C. *Private Treaty*

The sale will be to a party who has been previously identified as a potential purchaser following extensive marketing. The sale will be at the estimated current market price of the property as agreed by the HA's professional advisers and the DV.

Advantages

- Administrative costs are minimised.
- A quick sale can sometimes be achieved.

Disadvantages

- The best possible price may not always be achieved.
- Questions of public accountability can arise over the selection of the potential purchaser.
- There is no firm contract at the point of offer and acceptance.

Suggested Use

This option is normally more suitable for buildings than land—particularly for single houses with vacant possession. It could also be used in the sale of inaccessible land.

D. *Public Auction*

Before the sale the property should be widely advertised and the marketing agent, in consultation with the DV, should be asked to set a reserve price which will be confidential and known only to the HA and the auctioneer.

Advantages

- The property will be available to a wide market.
- Conditions of public accountability are fully complied with.
- The HA can be satisfied that on the day the best possible price was obtained.
- The element of competition can lead to a price in excess of the estimated market price.
- The sale is "certain" in that a contract is established on the day.

Disadvantages

- This option can be a time-consuming and lengthy process.

- Some potential purchasers dislike auction procedures and might therefore be lost.
- An auction does not always result in a sale.

Suggested Use

Public auctions are best suited to the disposal of smaller properties (eg houses) or properties which present difficulties (eg where no planning consent has been forthcoming).

E. *Profit and Income Sharing Arrangements with Developers*

The arrangements and the various options open are discussed in detail in Advice Paper 4.

Advice Paper 3—Notes on the Planning Guidelines for Redundant Hospital Sites in the Green Belt

General

1. The purpose of this note is to provide the background and fill in the detail on DOE Circular 12/87 and the associated guidelines (see Annex) as they affect HAs and to update HAs on the procedural issues which have arisen.

2. The Circular establishes a framework within which Local Planning Authorities are to evaluate and progress planning appraisals and any subsequent applications made by HAs for developing redundant hospital sites in the Green Belt. This initiative signalled a considerable change in policy specifically for the NHS in that it recognised that the continuing quality of such environmentally sensitive sites would be secured by careful reuse or re-development rather than allowing redundant and unused property and sites to deteriorate and possibly become derelict. The constraints built into the guidelines are intended to safeguard and enhance the quality of the Green Belt and to prevent development out of keeping with a sites's character.

3. Where HAs have surplus sites in Green Belt land they should prepare proposals, backed by carefully presented visual material, to demonstrate the environmental benefits of a sensitive development. The proposals should take into account the key features of the landscape and the scale, nature and condition of the existing site. This approach will be particularly important in those situations where the economic viability of a proposed reuse is uncertain.

4. Planning the future use and consequent disposal of such sites is a complex matter involving specialist skills not all of which are available in the health service. If the benefits which are implicit in the guidelines are to be fully realised, it is important that appropriate professional advice on all aspects of the project is obtained from the start. Because of the wide variety of local situations it is intended that the guidelines should be interpreted and applied flexibly, although this must not override, with the exception of the point made in Guideline 1 below, the requirement to treat the guidelines sequentially.

Use of the Guidelines

5. The following points of interpretation and detail should be borne in mind.

Guideline 1

In planning for the future of redundant hospital sites within the Green Belt the aim should be to use them for purposes compatible with the Green Belt. If the buildings are also of architectural or historical importance there is an additional reason for preserving them. Institutional uses may involve private hospitals, schools or universities, residential nursing homes, prisons, etc. In cases where there is little or no prospect of viable reuse, eg where the buildings are derelict or of a temporary nature, HAs should establish the views of the Local Planning Authority at the earliest opportunity and if agreed should proceed to Guideline 3. In such cases HAs must be able to demonstrate why they are unable to proceed on the basis of Guideline 1 or 2.

When considering bids for the site a nominal offer need not be accepted as it stands. In such cases the HA should consider with the RES and the DV (or the RES only, if the RHA is untied) and their other professional advisers the question of inserting a recoupment clause or of granting a lease in preference to an outright sale.

It should be noted that the term 'viable reuse' which appears in Guideline 2 refers both to the practicability and to the financial implications for the disposing Authority. HAs will find the assistance of external professional advice helpful to provide an opinion and market judgement as to the likelihood of viable alternative uses or users. Such a market appraisal is also relevant for Guidelines 2 and 3.

Guideline 2

If the approach outlined in Guideline 1 proves not to be possible or viable, then in appropriate cases converting the existing buildings for other uses, perhaps with some demolition of ancillary buildings, should be considered as a next step. In advertising the land and buildings to satisfy the requirements of Guideline 1, the HA should also consider the possibility of seeking a purchaser willing to convert the existing buildings to a new use. An analysis of the local situation will indicate whether marketing the property can embrace, at the same time, both Guidelines 1 and 2. In general therefore the advice given on Guideline 1 will apply equally to Guideline 2 and it should be noted that the term 'conversion' is not limited to a housing function and may also include uses such as the headquarters of a company, hotels, hostels, offices and workshops.

Guideline 3

This applies where after consideration of Guidelines 1 and 2, it is not considered viable to reuse the buildings for purposes compatible with the Green Belt policy or for conversion to an alternative use. It should be noted that the term 'area of the site' refers to the aggregate area of the total existing buildings, ie the footprint of the buildings themselves. Normally, new development should not exceed that aggregate area. Roadways, pathways, parking areas, etc for the new development are to be treated separately.

The location of the new development need not be tied to the location of the existing development. It is preferable that re-development should be sited so as to be in harmony with the main features of the landscape, its surroundings and any adjacent development. In principle architectural and site planning considerations should aim at improving the site layout and enhancing the environmental quality of the site. New development may extend upwards to the full height of the existing buildings but should not normally exceed that height. In appropriate cases existing single storey buildings may be replaced by conventional two storey housing development.

Guideline 4

The requirement to preserve and enhance the amenity value of a site will need to be considered at every stage in planning. The main option will invariably involve the dedication of such areas, together with their maintenance, to Local Authorities or the separate sale of land which can be developed for sporting or other recreational activities.

Guideline 5

The effect of this Guideline is to place HAs in no worse position than a private sector vendor or developer. HAs should take professional advice in every such case having regard to DOE Circular 22/83.

Guideline 6

This places a responsibility on Local Authorities to initiate appropriate changes to development plans and it is important therefore that HAs establish, and thereafter maintain, close links with Local and County Planning Authorities. It is useful for Planning Authorities to have an overview of an HA's intentions together with an indication of the timescales involved in the disposal programme. Finally, HAs should consider the possibility of acquiring adjoining or adjacent sites prior to disposal, if by so doing they can enhance the value of the existing site. Although the most likely case for doing this will be to improve inadequate access facilities, similar improvements for other reasons should be explored.

Procedural Issues

6. A number of procedural issues have developed since the original notes were issued in November 1987 (under cover of (PL(87) CO/2).

7. The first 3 Guidelines were conceived as sequential stages. However, in practice a Green Belt (or institutional) user can show an interest at any time prior to an HA obtaining planning consent for redevelopment. Thus an HA could find that planning consent for change of use or redevelopment is refused simply because a Green Belt (or institutional) user has belatedly registered an interest. To counter this the DV (as an independent party) should, at the expiry of the action under Guidelines 2 and 3, provide a written statement to the effect that:

- the property has been suitably and widely advertised and all Green Belt (or institutional) users have had a reasonable opportunity to declare an interest in the site
- proper attention has been paid to all parties who expressed an interest, and their status and viability have been assessed
- as a result of the foregoing no viable institutional use has emerged for the whole (or a substantial part) of the site.

8. In Guideline 2 the question of convertibility may be dealt with by a professional assessment of:

- disrepair and the consequential costs
- architectural considerations (eg listability, ceiling and floor heights, dimensions, floor loadings, etc)
- commercial viability in terms of an assessment of what would be the intentions of developers.

9. Under Guidelines 1 and 2 there is always the possibility that a 'bogus' institution might make an offer aimed at obtaining the freehold and realising an enhanced development value by declaring that the institutional use is not viable, or that the site is unsuitable for conversion. To counter this a rigorous scrutiny of all offers is essential and, where it is decided to accept an offer for institutional use or conversion, the HA should examine the advantages of granting a long leasehold with suitable restrictions to enable it to capitalise on any increase in value consequent on any later improved planning consents. At the very least, if the sale of the freehold is the recommended course, the conveyance should include a recoupment clause.

Finally

10. The Department would like to be advised of all cases processed under these guidelines and of any principles established as a result of decisions given by Local Planning Authorities or DOE.

Guidelines for the future use of redundant hospital sites in the Green Belt

1. Re-use of the existing buildings for purposes within the accepted Green Belt categories (as set out in DOE circular 14/84) is the preferred option, especially where the buildings are of architectural and historical importance. There may in particular be scope for re-use by institutions.

2. However, if there is little or no prospect of viable re-use within those categories, then other uses are preferable to allowing the buildings to remain empty or grossly under-occupied. The aim should be to achieve redevelopment for other suitable uses by conversion of the existing buildings.

3. If the existing buildings, or part of them, are unsuitable for conversion, then redevelopment should not normally occupy a larger area of the site nor exceed the height of the existing buildings. The location of the new buildings should be decided having regard to the main features of the landscape and the need to integrate the new development with its surroundings (eg it may be more appropriate to site new development closer to existing development).

4. The amenity value of the site should be retained or enhanced where practical by preserving mature trees and keeping or laying out landscaped areas, and if possible opening them to public access with adequate provision for their maintenance.

5. Redevelopment should not normally involve additional expenditure by the public sector on the provision of infrastructure (eg on roads and sewerage) nor should it overload local facilities such as schools and health care facilities.

6. Local planning authorities should where appropriate include policies on these lines in their development plans.

Advice Paper 4—The Sale of Surplus Land: Profit and Participation Considerations for Land with Development Potential

General

1. When HAs implement the provision of this paper they should always seek and follow appropriate professional advice including that of the RES and the DV (or the RES only, if the Region has been untied).

2. Most surplus NHS sites can be disposed of without undue problems associated with obtaining planning consent for the optimum land use. In these cases HAs market the land on a straightforward basis (using consultants as necessary) and require the purchaser to pay the consideration in full at the time of conveyance and before he is permitted to take possession.

3. However, there are sites when an immediate sale does not realise the full or potential value of the land and these cases need a greater degree of legal, marketing and monitoring expertise than is required for straightforward sales. This paper sets out some of the procedures which may be considered in freehold sales. Correctly employed, these procedures can offer considerable benefits for HAs, but it is essential, before employing any of them, that appropriate legal, professional and marketing advice is obtained.

4. Before HAs enter into any participation or profit sharing arrangements, they should ascertain that the purchaser is backed by adequate financial resources and that he offers the best combination of financial status and a proven track record of successful development, involving the resolution of town planning and other project problems.

5. In addition to the procedures set out below, there may be occasions when combining sites with an adjoining landowner may produce a beneficial result for both parties, eg enabling a larger site to be developed, resolving access problems or gaining planning consent. Such cases need to be carefully judged and appraised.

Participation and Profit Sharing Arrangements

6. The following six procedures may be considered.

A. Conditional Contracts

1 Sales by this method are recommended for consideration in cases where complex planning and other uncertainties exist or where there are a number of development or redevelopment options for the site. Contracts may be negotiated with developers on the basis that a sale is not completed until such time as the conditions (eg the issue of a detailed planning consent) have been met. It is essential that the HA retains a large measure of control and awareness in resolving the conditions, and obtains the best terms reasonably available.

2 The property should normally be advertised for sale with an invitation to submit proposals and offers; however, there may be exceptional occasions (eg where adjoining owners unite in opposition) when to advertise could prejudice the outcome of a subsequent planning application. In such circumstances, a restricted number of developers should be approached in confidence.

3 Normally, selection from a shortlist of, say, 3–6 developers will be on the basis of the best offer package in terms of realistic planning prospects and value. Even with problematical sites, developers are frequently willing to incur the costs in dealing with town planning and other issues.

4 As an alternative, invitations to formal (contractual) tenders may be sought and these are normally subject to the following basic conditions:

- that the successful tenderer will, within a specified period of time, enter into a contract to purchase the land conditional on the grant of planning approval, listed building consent (if appropriate) and the removal of any specified constraints on development
- that the contract will be of no further effect if, within a specified period of time, the conditions in the contract have not been met.

5 Where the potential for carrying out viable development is particularly attractive and there is a strong demand for the site from potential purchasers, the HA may wish to include a further condition whereby the purchaser would be required to pay a non-returnable deposit upon signing the contract. This arrangement (which is analogous to a payment for an option to purchase land) can provide further incentive to the purchaser to meet the other conditions in the contract, and it will ensure that the HA receives some consideration for holding the land pending resolving the conditions. The deposit should be pitched at a level which is commercially reasonable in the circumstances of the particular case. The object is to apply this and other conditions with the intention of inducing pressure on the developer to obtain the planning consent and to remove any other specified constraints on the sale. If the developer fails to obtain planning consent he may be expected

to submit an appeal; the time allowed before the contract ceases to be of effect should reflect this possibility. The HA should ensure that the specified time for resolving the conditions is the minimum necessary.

6 In exceptional cases the HA should consider the use of recoupment clauses in the contract which provide for an additional payment by the purchaser if an improved planning permission is granted within a stated period of time. Recoupment clauses can also be incorporated to provide for an additional payment in the event of an inflationary increase in the value of the property. However, unduly onerous conditions will have a detrimental effect on the tenders received.

B. *Option Arrangements*

1 There are circumstances where it will be clearly advantageous for HAs to enter into option arrangements, rather than conditional contracts with developers. In essence the arrangements allow developers a precisely determined period of time in which to enter into an unconditional contract to purchase land. The terms are comparatively uncomplicated; essentially they provide for:

- a non-returnable down payment
- the prescribed term the option will run
- an agreed price.

2 The agreed price may be increased by a notional interest charge which is related to the time period before the option is exercised.

3 The advantage of the option is that it obliges the developer to make a firm decision (to purchase or not to purchase) within the time set by the option. Prevarications over the details of a planning consent or its conditions are consequently avoided.

4 As with conditional contracts, it is essential for HAs to be fully aware of, and in accord with, the developers' dealings with the town planning authorities so that future negotiations by the HA are not prejudiced.

C. *Profit Sharing*

General

1 The main advantage of profit sharing arrangements is that they may result in an HA participating in substantial growth in values if a development is highly successful. The objective is ultimately to obtain the best disposal terms for the land, although there can be no guarantee that the HA's aspirations will fully materialise in every case. The principal disadvantages are that negotiations to settle the formulae and other terms can be complex and time-consuming.

2 Profit sharing contracts have been widely adopted in the private sector and by some local authorities, new town development corporations and the London Dockland Development Corporation. The contractual arrangements differ according to whether the land is intended for housing or commercial (or other) development but there is no set form and they are easily tailored to the requirements of each case.

3 A detailed appraisal of offers should be carried out to ensure that:

- the reduced payment at the outset is more than offset by the estimated profit share
- the developer's costs and sale terms are realistic and can be professionally checked to ensure that the predicted profit share is in practice likely to be achieved.

Housing Land

4 The vendor usually grants a building licence to the developer which enables him to erect and market the houses. When a sale is agreed the vendor conveys the freehold direct to the ultimate purchaser. The licence provides for a land price to be paid to the vendor. Payment is normally made in full at the commencement of the licence, or in stages at regular intervals, or as and when the houses are sold.

5 Terms controlling profit sharing normally include provisions for the parties to agree an estimate of the open market value of the houses which forms the base value but does not fix the price. The actual price is adjusted in line with market movements, and when the house is conveyed any surplus (comprising the difference between the base value and the actual price) is shared between the parties in accordance with the agreed terms. Alternatively, a percentage of the completed house sale price (to represent the land price) is applied throughout. Contracts should normally include a minimum payment provision, and a time constraint for the completion of the houses.

6 Developers normally resist terms where the share of the uplift in house prices does not reflect increases in development costs. A solution is to settle on a share which relates to increases in the sale prices above increases in an agreed building cost index.

7 Similar procedures may be adopted to suit cases where the freehold has been conveyed to the housebuilder at market value before the development has started. However, the licence method is the preferred method because it ensures that the vendor is in a position to maintain a high degree of control.

8 Profit sharing terms can be used to stimulate interest in areas (eg certain inner city areas) where there is uncertainty

over the demand for the houses to be built. The base price for the land can be fixed at a modest level to reflect the risk element but the terms of disposal should ensure that the HA receives the full share of any uplift in the land value.

Commercial (and other) Land

9 The successful tenderer is normally required to enter into a building licence which may be conditional upon the grant of detailed planning consent. The licence should require the developer to carry out a specified and agreed development and to market the completed buildings effectively. He is normally required to pay the agreed land price on the execution of the licence and the balance under the agreed profit sharing terms on completion of the development. Development profits represent the difference between the developed value and the development costs. The aim should be to convey the freehold interest in the land to the developer on completion of the scheme when the developer has complied with his undertakings to the HA. However, there will be occasions when a developer will insist on the conveyance of the freehold before making a full payment for the land and the HA will have to rely upon the quality of legal drafting and registering the contract to safeguard its profit share.

D. *Clawback (Recoupment) Arrangements*

1 Despite efforts by an HA to achieve the best possible planning permission prior to a sale, a purchaser may secure a more valuable consent at a later date and leave the HA open to criticism that the disposal price was not the best obtainable.

2 To avoid such criticism the HA should consider the appropriateness of inserting a clawback arrangement in the contract of sale which will entitle the HA to a further payment if planning consent is subsequently granted or other stated conditions are met.

3 Clawback clauses can take many forms and may, for example, provide for recoupment based on a fixed payment, or an agreed proportion of enhanced value. The clause will usually contain a provision to refer disputes to arbitration and to specify that the recoupment provisions are subject to a time limit after which they cease to be of effect. A model clawback clause (together with the associated advice note) is available to HAs from the Department on request.

4 The principal disadvantages of introducing clawback provisions into a disposal are that they may significantly reduce the incentive of a purchaser to pay an initial "up front" open market price and, because the covenant will not run with the land, there may be practical difficulties in enforcing the provisions if the purchaser subsequently becomes unwilling or unable to honour the obligations imposed.

E. *Joint Sale Arrangements*

1 Occasionally the value of surplus land can be enhanced by including it in a joint sale arrangement with adjoining or adjacent land held by other owners who wish to sell, eg the conditional contract procedure could be used by the joint vendors to enable a purchaser to apply for the optimum planning consent on an enlarged site, thereby releasing a marriage value premium. The profit sharing procedures may be applied depending on the degree of complication acceptable to the parties.

2 A joint sale with an agreed formula for the division of proceeds can be highly successful, but it has the risk of the adjoining owner withdrawing his property at a late stage in the disposal process.

3 Taking an option to purchase the adjoining or adjacent land or agreeing to buy it outright — as an alternative to a joint sale — is frequently the preferred solution.

F. *Construction of New Works on Retained Land as part of the Consideration for Disposal*

1 There will be occasions where an HA proposes to dispose of part of a site and the retained land also has development potential. In such cases it would normally be essential to reserve rights in respect of retained land to connect not only to existing services but also to roads and sewers to be provided by the purchaser.

2 There may be financial advantage in seeking from prospective purchasers tenders which require them to construct new HA works on the retained land as part of a disposal "package". This may be of special significance where works on the retained land are dependant on roads and/or services to be provided on the land to be sold.

3 Only builders/developers considered competent to complete the HA developments should be invited to tender and tender prices should be divided to ensure that the correct sums are advanced against architects' certificates as the development proceeds.

Advice Paper 5—The Health and Medicines Act 1988: Implications on Property Transactions

General

1. This paper sets out guidance on the implementation of certain powers contained in the Health and Medicines Act 1988. When HAs implement the provisions of this paper they should always seek and follow appropriate professional advice including that of the RES and the DV (or the RES only, if the Region has been untied).

The Opportunities

2. Section 7 of the Act provides that in order to make more income available for improving the health service the Secretary of State shall *inter alia* have the power to acquire land by agreement and manage and deal with land. This clearly provides a greater flexibility and commercial freedom to deal with surplus land and it makes possible (subject to the controls expressed in this paper) the more profitable forms of transaction commonly available to the private sector landowner.

3. The intention of section 7 is that HAs will be able to manage their estate more efficiently and achieve higher levels of return. It is important that land transaction initiatives are fully appraised and produce definable and well judged benefits for HAs when compared with the alternatives. Accordingly, highly speculative activities, eg direct commercial development and speculating in the property investment and land dealing markets, will not be permitted. Exceptionally, the Department will consider proposals for an HA to carry out a commercial development which is ancillary to a major new hospital project. The request for Departmental approval should contain full marketing and cost details of the proposal and an assessment of the benefits which will accrue to the HA.

4. Until now HAs have been required to sell the freehold of surplus sites and, in most disposal transactions, the straightforward sale of the freehold is still the best course to follow. An outright disposal can realise a predictable capital sum and, on completion of the sale, the HA's obligations for that asset are concluded. However, where the HA's professional marketing advisers support the view that values are rapidly rising or the full development potential is still to be established (Green Belt sites falling to institutional use are a case

in point), the granting of a "long lease" or an "agreement for a lease", with the terms structured to permit the HA to participate in the higher values and returns when they occur, may be more appropriate.

Controlling Risk

5. Leasehold arrangements involving private sector development schemes are necessarily more complicated than the straightforward disposal of freeholds. Concomittent with the potentially higher returns from participating in development schemes are the higher risks of failing to assess:

- the development prospects and therefore the level of return
- the developer's financial status, track record (in producing successful developments) and integrity in honouring obligations
- the legal complexities to ensure HA control over the form and completion of the development and therefore the predicted returns.

Granting Leasehold Interests

6. Where HAs dispose of surplus land by the conveyance of a leasehold instead of a freehold, the transaction must be concluded on the best open market terms. HAs can expect developers and land dealers to have a clear idea of their own requirements, to be well rehearsed in all the aspects of development and to be expertly advised on the numerous nuances of legal and financial drafting. For these reasons HAs should ensure that they too are commensurately equipped to handle these cases and should not give any undertakings to outside parties without first taking professional, legal, accountancy and marketing advice.

7. HAs must establish management arrangements to supervise the lease terms, eg to ensure that the agreement terms have been complied with, repairs carried out, rents reviewed and notices served on time. The costs involved should be fully reflected in the investment appraisals referred to in paragraph 3.

8. The grant of leases may be particularly useful where commercial development is proposed and there is the prospect of a high growth in values. (Only rarely will leasehold arrangements be appropriate to residential land.)

9. Commercial development leases are normally structured as follows:

- the HA enters into an agreement with the developer for a lease which specifies the type of development, town planning permissions, time factors and the lease terms
- the developer bears the full development costs and the risks associated with the development project
- on satisfactory completion of the development the lease is granted to the developer who is required to ensure occupation on the best market terms
- the lease to the developer should include provision for the payment to the HA of an agreed percentage of the rental income receivable from the lessees subject to a minimum level rent (ie a "base rent")
- the minimum rent is determined when the agreement for a lease is exchanged with the developer and should reflect the open market value appropriate to the land.

10. Development agreements normally include:

- a precise description of the proposed development
- the dates for commencement and completion
- phasing considerations
- the arrangements for calculating and timing the payments by the developer to the HA
- marketing arrangements for the completed development
- arbitration and penalty provisions.

Rental Terms

11. Normally, rentals are measured against the current rack rental value and are subject to rent reviews at three or five year intervals. However, some property (notably new shopping centres, hotels, petrol filling stations and public houses) is distinguished by the lack of free market evidence and poses difficulties for assessing rental values. This problem is frequently dealt with by establishing a "base rent" which is "topped up" with a negotiated percentage of business turnover ("turnover rents"). These agreements necessitate formal arrangements for establishing the turnover by independent audit which should permit full inspection rights for the lessor. The correct percentage of turnover is a matter for expert advice, as are the "base rent" and the methods for its review.

Adjacent and Adjoining Land

12. To assist HAs in enhancing the disposal proceeds of surplus land, other land may be acquired whether adjoining or otherwise. Examples include facilitating the improvement of road access, sight lines and road junctions. Acquisitions should be clearly supported by marketing evidence which fully explains the benefits.

Town Planning

13. HAs are reminded of the necessity of first obtaining town planning permission for non-service projects.

Wider issues

14. Ministers are concerned to ensure that the new powers are not used to the detriment of patients, or allowed to interfere with the duty of HAs to provide services under the NHS Act 1977.

15. HAs are reminded of the need to ensure that proposals for the granting of leases on retained land or buildings do not:

- impair future service proposals, eg hospital extensions or rebuilding
- reduce future disposal prospects
- prejudice provisions for access for present use and future disposal possibilities.

16. The use of "unconventional finance" must always be referred to the Department for approval. (Guidance on "unconventional finance" is given in Appendix 4 to Financial Matters FM 11/86).

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